IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 27TH JULY 2007 / 5TH SRAVANA 1929

WP(C).No. 37043 of 2004(I)

PETITIONER:

K.A.PRADEEP, S/O.APPUKUTTAN,
KANNANCHOTH HOUSE,MANJERI,MALAPPURAM DIST.,REP. BY HIS POWER OF ATTORNEY HOLDER KANNAM VALLI KANAKADAS, KARURAMBBRAM DESOM, AMSOM, NARUKKARA VILLAGE, ERNAD TALUK, MANJERI, MALAPPURAM DISTRICT.

BY ADV. SRI.M.V.BOSE
SRI.VINOD MADHAVAN
SMT.NISHA BOSE

RESPONDENTS:
----

1. BRANCH MANAGER,
NEDUNGADI BANK LIMITED, MANJERI.

2. PANJAB NATIONAL BANK LTD.,
MANJERI.

3. M/S. SAFE AUTO INDUSTRIES, MANJERI.

4. MOHAN RAJA, MANJERI AMSOM DESOM.

5. VIJAYENDRA KUMAR, MALAPPURAM.

BY ADV. SRI.P.RADHAKRISHNAN (1) -- R1 AND R2
SRI.MADHU RADHAKRISHNAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 27/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C) NO: 37043/2004

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1. COPY OF THE ORDER DT. 14/12/2004 IN IA NO. 2168/2004 IN OS NO. 45/2000.

RESPONDENT'S EXHIBITS **NIL.**

True copy

tga

PIUS C. KURIAKOSE, J.

W.P.(C) NO. 37043 of 2004

Dated this the 27th day of July , 2007

JUDGMENT

In this writ petition under Article 227 of the Constitution, the petitioner, who is a power of attorney holder of the 2nd defendant in a suit for recovery of money filed by the first respondent bank, challenges Ext.P1 order by which the learned Subordinate Judge dismissed an application filed by him for leave to represent his principal in the suit. An interlocutory application was filed by the petitioner under Section 151 of the Code of Civil Procedure read with Rule 22 of the Civil Rules of Practice producing power of attorney dated 18.1.2003 executed by the 2nd defendant in the suit in his favour and Ext.P1 is the order on that application.

2. A counter affidavit was filed to the application by the respondent bank wherein the objections were to the effect that the power of attorney is not attested by witnesses and that the same has not been duly authenticated by the notary. The

objections found favour with the learned Subordinate Judge who took the view that there is no proper authentication of the power of attorney and that there is no proper endorsement by the notary public to the effect that signature of the principal has been subscribed to in the notary's presence. Accordingly, the learned Subordinate Judge dismissed the application. In fact on the same day the learned Judge, by a separate order dismissed another application filed by the petitioner seeking reception of the written statement filed by him through the power of attorney holder on the reason that I.A.2168/2004 filed by the petitioner for permission to conduct the case by the power of attorney stands disallowed. That order is separately challenged by the writ petitioner in W.P.(C) No.15708/2005.

3. I have heard the submissions of Sri.Vinod Madhavan, the learned counsel for the petitioner and those of Sri. Madhu Radakrsihanan the learned counsel for the respondent Bank. A copy of the power of attorney as well as copies of the application and counter were placed before me for my perusal by the learned counsel. Strong reliance was placed by Mr.Vinod Madhavan on Section 85 of the Indian Evidence Act and the decision of the

Supreme Court in **Jugarj Singh and another v. Jaswant Singh and others (AIR 1971 SC 761)** to contend that it is not necessary that the notary says in the endorsement that he was convinced regarding the identity of th executor. The notary seal itself enjoys the presumption that the document has been duly authenticated. The learned counsel also relied on the judgment in **Narayanan Nair v. John Kurien (1988 (1) KLT 673**) to argue that the scope of Rule 14 of order 6 of CPC is not circumscribed by any rules in Civil Rules of Practice and that even an oral authorisation will be sufficient. The counsel submitted that Rule 22 of the Civil Rules of Practice does not insist on any power of attorney and that any other written authority containing authorisation will suffice. Even if the power of attorney in question is not a duly authenticated one then also it could be construed as 'other written authority' for the purpose of Rule 22.

4. Sri.Madhu Radhakrishnan would refer to the judgment of the Supreme Court in Jugaraj Singh's case (supra) itself and submit that in that case there was an endorsement that the principal had subscribed his signature to the power of attorney

and sworn in the presence of the notary public concerned, unlike the present one where there is no such endorsement. Sri.Madhu would rely on the judgment in **Iyakku Mathoo v. Julius Elias Metropolitan(AIR 1962 Kerala 19 (v 49 C 13)** and argue that the proviso to Rule 14 of Order 6 CPC does not apply in a case where a party is permanently residing abroad like the present petitioner.

5. I have perused the power of attorney in question. After the introductory and operative clauses, the same concludes as follows.

" In witness where of, I have set my hands to this the 18th January 2003 in the presence of the following witness.

Principal
(K.A.Pradeep)"

There are no witnesses to the power of attorney and the endorsement of the notary just below the above quoted portion is as follows:

" IN TESTIMONY WHEREOF I have hereunto set my hand and affixed seal of my office at Manjeri this the 18th January 2003"

6. The argument of Sri.Vindo Madhavan before me was that the endorsement of the notary bears testimony to whatever the principal (executant) has stated in the introductory and operative and concluding portions of the power of attorney. In other words, the learned counsel's submission is that by the endorsement, the notary has endorsed all the claims of the petitioner including on regarding his identity. The above argument of the learned counsel cannot be said to be without any merit. But I will immediately observe that the notary could have endorsed in so many words that the power of attorney is executed by the principal in her presence and that she has authenticated its execution.

7. It is not in dispute that the signature to the power of attorney is that of the 2nd defendant. What is in dispute is its due authentication by the notary public. Section 85 of the Indian Evidence Act provides for certain presumption regarding power of attorney and that Section reads as follows:

"The court shall presume that every document purporting to be a power -of -attorney, and to have been executed before

and authenticated by a Notary Public..... was so executed and authenticated". The presumption under Section 85 is regarding both execution and authentication in respect of all documents which purports to be power of attorney executed before authenticated by the notary public. As for the power of attorney in hand though the endorsement made by the notary is unsatisfactory, it cannot be said that the document is not a document which purports to be a power of attorney executed and authenticated by a notary public. Significantly the document bears the seal of the notary. Non- attestation by witnesses will not be fatal to the power of attorney since it is not at all obligatory that a power of attorney should be attested by two witnesses. What is necessary is only its authentication.

8. Rule 22 of the Civil Rules of Practice, which deals with situations where the party appears by an agent other than pleader, provides that the agent shall file in the court the power of attorney or other written authority authorising him or a properly authenticated copy thereof. In the instant case there is no denying the fact that the document which was pressed into service by the petitioner as a power of attorney comes within the

ambit of the expression 'other written authority'. Importantly the identity of the signatory to the power of attorney is not disputed. What is disputed was, as already stated, is only its value as a power of attorney. In this case the learned Subordinate Judge should have permitted the signatory to the writ petition to defend the suit as the agent of the 2nd defendant.

9. In the above view of the matter it is not necessary for me to consider the argument of Sri.Vinod Madhavan based on Justice Thomas's decision (Narayanan Nair v. John Kurien) 1988 (1) KLT 673) that an oral authorisation will suffice. In that decision the learned judge noticed that an affidavit was filed by the principal himself in which he had stated that he had authorised his agent to defend him in the suit. In the instant case no such affidavit is seen sworn to by the principal. It is the agent alone who claims that he has been authorised. Thus the principles laid down in Narayanan Nair's case(supra) may not be applicable to the present case. However, at any rate the power of attorney in question can be construed as 'other written authority' for the purpose of Rule 22 of the Civil Rules and Practice. The petition succeeds. I set aside the impugned order

and allow the I.A.

The Writ Petition is allowed as above. No costs.

PIUS C. KURIAKOSE,
JUDGE.

dpk